Supreme Court, U.S.
FILED

941245 JAN 20 1995

No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

EUGENE F. BEVACQUA,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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January 16, 1995

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56 pp

QUESTION PRESENTED

Is a United States Customs Officer authorized to perform a personal search on a citizen, resulting in serious personal injury to such citizen, when the officer was conducting the search for a retaliatory reason and when the officer had no suspicion, not even a hunch, that the citizen was smuggling, armed or in any other way violating the law?

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The Petitioner, Eugene F. Bevacqua, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 27, 1994.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals subject to this petition appears in the Appendix at 41a. The District Court's Memorandum Opinion, Findings of Fact, and Conclusions of Law and Judgment appears in the Appendix at 1a and 40a, respectively.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 27, 1994. Appendix at 41a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This petition is timely, having been filed within 90 days after entry of judgment by the Ninth Circuit Court of Appeals, pursuant to Rule 13 of the Supreme Court Rules.

STATUTES INVOLVED

19 U.S.C. § 482.

STATEMENT OF THE CASE

Petitioner (Bevacqua) was a brakeman for the Union Pacific Railroad Company who incurred a serious knee injury when he was subjected to a personal search by U.S. Customs Officer, Keith Barnhart, on May 20, 1991. Petitioner brought his damage claim against the United States of America (U.S.) pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 through § 2680 and 28 U.S.C. § 1346(b). Bevacqua brought his claim against the U.S. claiming that Barnhart's grabbing and searching him was unauthorized and hence a battery. The District Court found that the search of Bevacqua by Barnhart was in retaliation for noise problems created by Bevacqua's employer, the Union PacificRailroad Co., and that retaliatory searches were specifically prohibited by the customs manual (Appendix at 3a and 21a). The District Court also found:

> Under the law of the Ninth Circuit, and as set forth in the Customs regulations, minimal or mere suspicion is required for such a personal

> pat-down search. The court finds that the customs officers had absolutely no suspicion, not even a hunch, that Mr. Bevacqua was smuggling illegal goods into the country, or that he was armed with a dangerous weapon. The court is satisfied that Inspector Barnhart did not have the authority to insist that Bevacqua proceed to secondary inspection and force him there for the purpose of conducting a pat-down search and/or frisk, both under Customs Directives, and the law of the Supreme Court and the Ninth Circuit.

Appendix at 32a.

Even though the District Court found that the contact and search of Bevacqua by Barnhart was unauthorized [and therefore a battery], the District Court wrongly determined that the intentional tort of battery is not cognizable under the Federal Tort Claims Act. Appendix at 10a, 11a. See 28 U.S.C. § 2680(h), which specifically authorizes such a claim under the Federal Tort Claims Act.

Bevacqua then appealed this ruling to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291. The District Court Judgment was entered on February 23, 1993 and Bevacqua's Notice of Appeal was filed on March 4, 1993, therefore making it a timely appeal pursuant to Rule 4(a)(1) F.R.App.P. The basis for jurisdiction in the Court of Appeals is 28 U.S.C. § 1291.

The Ninth Circuit Court of Appeals affirmed the District Court holding that a pat-down search, where a customs officer's hands are laid upon a person, is a routine search and requires no suspicion whatsoever, and was authorized even though it was a retaliatory search.

The sole issue in this case is the legality of the contact and personal

search which resulted in Bevacqua's serious knee injury. If the initial grabbing of Bevacqua by Barnhart was unauthorized, it was a battery.

19 U.S.C. § 482 provides that a customs officer may search any person whom he suspects has merchandise subject to duty on his body. Different standards have been applied by the Circuit Courts as to what suspicion is necessary, depending upon the intrusiveness of the search. However, the statute and the Circuit Courts require "some" or "mere" suspicion before a personal search can be commenced.

Neither 19 U.S.C. § 482, the broad search powers granted the U.S. Customs Service by Congress, any ruling by a Circuit Court or this Court, or the United States Constitution in any way justifies or authorizes the physical contact of Bevacqua by Barnhart under these facts, found by the District Court.

ARGUMENT

This is not a drug-smuggling case. This is a case about a United States citizen who was performing his job for the Union Pacific Railroad Company at a time when the U.S. Customs Officers in Eastport, Idaho initiated a retaliatory search on certain employees of Union Pacific. The District Court specifically made the following factual finding:

> The court finds that the heightened inspections on May 20 and May 21 were in retaliation for the noise problem. The failure of the railroad to satisfy Inspector Barnhart's complaints on May 19 was a proximate cause of the heightened inspection commencing on May 20.

Appendix at 3a-4a.

The District Court also found that the Customs Department Manual specifically prohibited any retaliatory searches. Appendix at 21a.

19 U.S.C. § 482, the statute which allows customs officers to search persons, beyond question, requires suspicion and states as follows, in pertinent part:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine. . . any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law. . . and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law. (emphasis added)

Furthermore, the District Court made the following finding of fact:

That some suspicion is required in order to conduct a personal search at the border is clearly recognized by the Customs Service. The U.S. Customs Service Inspector's Handbook (1978 edition) § 9.12.1 states in pertinent part:

> 'The search authority of Customs officials is broader than that vested in other Federal officers. This is because of the recognition that such search authority is essential to the proper enforcement of the laws governing the entrance of persons and things into the U.S. This essential authority must be zealously guarded against any abuse. Customs search authority is based on real suspicion and articuable facts that merchandise or contraband is being introduced into the U.S. contrary to law. . .
>
> 'a. A personal search is not a routine search, and the decision to perform such a search is not to be taken lightly. A personal search cannot be initiated as a retaliatory or punitive measure...

'b.There are three types of personal searches. Each of these searches require a different degree of suspicion that contraband or merchandise is concealed on the person.

(1) Pat down. A pat down of a person's clothing will not be made as a matter of routine but only when it is deemed necessary as a result of some suspicion on the part of the Customs officer that there is merchandise or contraband which is being introduced into the U.S. contrary to law. A pat down is always the first step in a personal search.'

The Customs Law Course § 3.600 entitled **Border Search and Seizure of Persons** provides in pertinent part:

'People may be seized and subjected to a pat-down search. **By policy, some or mere suspicion is needed to pat-down.** Some or mere suspicion can be as little as a hunch.'

Appendix at 21a.

Also, the District Court found that the customs officers had absolutely no suspicion that Bevacqua was smuggling, armed, or violating any laws. In this regard, the court made this factual finding:

Under the law of the Ninth Circuit, and as set forth in the Customs regulations, minimal or mere suspicion is required for such a personal pat-down search. The court finds that the customs officers had absolutely no suspicion, not even a hunch, that Mr. Bevacqua was smuggling illegal goods into the country, or that he was armed with a dangerous weapon. The court is satisfied that Inspector Barnhart did not have the authority to insist that Bevacqua proceed to secondary inspection and force him there for the purpose of conducting a pat-down search and/or frisk, both under Customs Directives, and the law of the Supreme Court and the Ninth Circuit.

Appendix at 32a.

As set forth above, the District Court found that the Customs Department had determined that a pat-down search is a personal search and that a personal search is not a routine search.

The Ninth Circuit, along with the Second, Fifth, and Eleventh Circuits have all held that the level of suspicion to authorize a personal search of a person at the border, *i.e.* a pat-down search, is "some", "mere", or "minimal". In this regard, the Ninth Circuit has so ruled in *United States v. Palmer*, 575 F.2d 721 (1978), *cert. denied*, 439 U.S. 875; *United States v. Grayson*, 597 F.2d 1225, 1228 (9th Cir. 1979), *cert. denied*, 444 U.S. 875 (citations omitted); *United States v. Carter*, 563 F.2d 1360, 1361 (9th Cir. 1977); *United States v. Couch*, 688 F.2d 599, 604 (9th Cir. 1982), *cert. denied*, 459 U.S. 857 (citations omitted); *United States v. Wilmot*, 563 F.2d 1298, 1300 (9th Cir. 1977); *United States v. Des Jardins*, 747 F.2d 499 (9th Cir. 1984). In addition the Second Circuit in *United States v. Glaziou*, 402 F.2d 8 (2d Cir., 1968) has so ruled as has the Eleventh Circuit in *United States v. McMurray*, 747 F.2d 1417 (11th Cir., 1984) and the Fifth Circuit in *Thomas v. United States*, 372 F.2d 252 (5th Cir., 1967).

A search which is commenced by a customs officer in retaliation against a citizen or group of citizens is, on its face, unauthorized. Furthermore, the Customs Department has clearly prohibited any of its officers from performing a retaliatory search as found by the District Court. Quite simply, there is never any authority or justification for labeling a retaliatory search as a routine search, especially when the Customs Department specifically and unequivocally prohibits such retaliatory search.

The Ninth Circuit has now attempted to justify the personal search of Bevacqua by finding that the search was routine. As a matter of law, the

search was not routine when it was found by the District Court to be retaliatory.

The Ninth Circuit's decision, albeit unpublished, is in direct conflict with the Ninth Circuit's other six decisions and the above-mentioned decisions from the Second, Fifth and Eleventh Circuits. On this basis alone, this Court should grant Bevacqua's petition.

Furthermore, the Ninth Circuit, having already ruled in six separate decisions that a pat-down search under 19 U.S.C. § 482 requires "some" suspicion, cannot in an unpublished opinion, eradicate this serious battery claim without departing from the accepted and usual course of judicial proceedings. This action calls for an exercise of this Court's power of supervision.

Finally, there are virtually no cases in American jurisprudence where the battery of a citizen by a customs officer revolves on the officer's authority to lay hands upon the citizen. It is of extreme importance to the citizens of our country that the U.S. Customs Department is not given the authority to make unprivileged contact with our citizens, causing serious personal injury, with no relief available. This has occurred in this case because the Ninth Circuit has ruled that a retaliatory search with no suspicion whatsoever is routine. Such search, as a matter of law, cannot be routine.

In this regard, Bevacqua is very cognizant of the war against drug smuggling at our nation's borders and Bevacqua appreciates the wide powers bestowed upon the U.S. Customs Department to search for illegal

drugs and contraband. However, when a customs officer acts in retaliation, as specifically found by the District Court, and in direct violation of the written prohibition of the U.S. Customs Department, our citizens are entitled to protection.

Furthermore, when a customs officer, acting in retaliation, commences to lay hands upon a person's body when he has no suspicion whatsoever, not even a hunch, that he is violating any laws, the citizen is entitled to protection. Bevacqua is not a drug smuggler and no question exists of drugs being confiscated due to an illegal search.

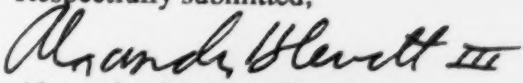
This is an issue of exceptional importance which has wended its way through the District Court and on through the Ninth Circuit Court of Appeals with Bevacqua's relief being denied, first, because the District Court mistakenly ruled that a battery is not cognizable under the Federal Tort Claims Act and secondly, because the Ninth Circuit has found a retaliatory search with no suspicion to be a routine search.

19 U.S.C. § 482, the Customs Department Manual, and the decisions of the Circuit Courts of Appeal mandate that this search was not a routine search and that this search was unauthorized.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

Respectfully submitted,



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January 16, 1995

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

EUGENE F. BEVACQUA, Plaintiff, vs. UNITED STATES OF AMERICA Defendant.	NO. CIV-91-0178-N-HLR-JLQ MEMORANDUM OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on for trial by the court on September 21, 1992. The Plaintiff appeared personally and through his attorney Alexander Blewitt III. The Government was represented by D. Marc Haws, Assistant United States Attorney for the District of Idaho. Evidence was introduced, and the court heard the argument of counsel. The court rendered an oral opinion with findings of fact. Supplemental briefs were thereafter submitted by the parties on the issues of law. This Opinion is intended to be the final decision of the court and shall replace any portion of the court's oral opinion that is inconsistent herewith. Being fully advised in the premises, the court makes the following:

FINDINGS OF FACT

This case arises from an incident occurring on May 21, 1990 at the United States/Canada border at Eastport, Idaho. Plaintiff brought this action pursuant to the Federal Tort Claims Act, 28 U.S.C. § § 1346 (b), 2671 through 2680, claiming he has suffered damages as a result of injuries sustained by the acts of Keith Barnhart, a customs inspector, and an agent of the United States Department of Treasury.

The Plaintiff, Eugene F. Bevacqua is a trainman employed by the Union Pacific Railroad Company (UP), and lives in Spokane, Washington. He has been a trainman with the UP since March 30, 1973. As a U.P. crew member, Mr. Bevacqua had made the run from Spokane, Washington to the United States/Canada border at Eastport, Idaho on numerous occasions. Mr. Bevacqua had made the same number of return trips from Eastport to Spokane.

Essentially the runs are scheduled as follows: a UP crew of three or four trainmen pulls a loaded train from Spokane, Washington to Eastport the first day, then stays overnight at Eastport. The following day, using the same engines or "power units", they cross the border into Canada, to attach their power units to a string of Canadian Pacific Railroad (CP) cars loaded and sitting in the rail yard on the Canadian side of the border. The crew then pulls the Canadian cars through the Eastport Port of Entry and returns to Spokane.

Over some twenty years, the Customs officers at Eastport had allowed the trains and train crews to pass back and forth across the border with only cursory examination. They would observe the train pulling through the Port of Entry, and would only occasionally stop the train to inspect an unusual load. The crews were never personally questioned or inspected. However, on May 20, 1990, without prior notice to anyone, the customs officers at Eastport instituted a temporary heightened inspection of the UP trains and crews.

Prior to the heightened inspection instituted on May 20, 1990, customs officers at Eastport had made ongoing complaints about the noise generated from the UP trains at the border. On May 19, 1991, this problem was compounded by an air valve on the train, repeatedly popping off, causing obtrusive noise interference with the customs officers at the inspection station in Eastport. Customs Inspector Keith Barnhart was upset on May 19th about the noise, and the lack of response to his complaints. He conveyed this to Thomas Osborne, an Engineer for the UP, and stated that if the railroad did not want to cooperate on that problem there could be and would be heightened inspections, and that the Customs Officers would require strict compliance with the law.

The court finds that the heightened inspections on May 20 and May 21 were in retaliation for the noise problem. The failure of the railroad to satisfy Inspector Barnhart's

complaints on May 19 was a proximate cause of the heightened inspection commencing on May 20. However, the court also finds that, despite the retaliatory reason for the heightened inspections the officers were entitled to conduct an intensified inspection of the train crews, as it took place on May 20 and May 21.

The first UP crew to be subjected to the heightened inspection crossed the border on its return run with the Canadian cars on May 20, 1990. The crew members were asked for identification. When identification cards issued by the UP Railway were tendered, Inspector Barnhart informed them that such ID was inadequate because it did not include the person's date of birth, and that a driver's license or birth certificate was necessary. The crew, including Engineer Lloyd Wayne Dorsey complied, by providing their drivers licenses. Additionally, as a result of this heightened inspection,Mr. Dorsey's personal luggage was inspected and a prescription pill found in an aspirin bottle was seized and disposed of.

Mr. Dorsey spoke with the crew scheduled to make the next scheduled Spokane to Eastport run, which consisted of Conductor Glen Batty, Engineer Jim Johnson, an Engineer Trainee, Dean Davis, and Brakeman, Plaintiff Eugene Bevacqua, warning them of what to expect when they reached Eastport on May 21, 1991. The May 21 crew discussed the situation, and decided that they would only minimally comply with the customs officers'

directions. It was decided that if asked for identification, they would provide only their railroad identification cards.

On the morning of May 21, 1990, the UP crew crossed the border into Canada with their power units, attached the CP cars, and pulled into the depot. The crew was told to stop and come into the depot. Supervisory Customs Inspector Keith Barnhart and Customs Officer Susan Wilson met with the crew in a room in the depot. Inspector Barnhart asked Conductor Glenn Batty to sign a form in order to verify that the signature on the cargo manifest for the train was that of Mr. Batty. Conductor Batty, upset by the situation, reluctantly signed the manifest form, and placed a call to his supervisor Sam Tortorelli, Jr. in Spokane. Mr. Tortorelli informed Conductor Batty that the crew should comply with the custom officers' directions. At about this time, all crew members were asked to produce identification. The crew tendered their railroad IDs as they had previously agreed, but were told that identification showing each crew member's birth date was required.

Somewhat reluctantly, Conductor Batty, Mr. Johnson and Mr. Davis produced their drivers licenses. Each crew member, and Mr. Bevacqua in particular, was upset over the heightened inspection, and they appeared to have a chip on their shoulders. Bevacqua was obdurate and obstreperous. He uttered his displeasure with comments such as "this is bullshit", but

eventually tossed his drivers license through the air onto the table in front of Officer Wilson.

The evidence does not establish that, when Bevacqua threw the drivers license through the air, he intended it to strike Inspector Wilson; that the license hit Inspector Wilson; or that there was any assault or battery on Inspector Wilson. Wilson testified that she didn't even know the license was in front of her until she looked down and saw it on the table. The prior conduct of Mr. Bevacqua, and his method of throwing his license across the table incited Mr. Barnhart, who also had a "chip on his shoulder." Barnhart became angry, and he, without any further discussion with anyone, said he was going to take Mr. Bevacqua to "secondary." Mr. Bevacqua did not know what "secondary" was, and Inspector Barnhart did not explain to Mr. Bevacqua where he was going or what "secondary" meant. The court finds that the evidence established that Barnhart merely said "You're coming with me." Mr. Bevacqua said "I'm not going anywhere with you," and the trouble began.

The court is unable to find that there was any factual basis that existed in the depot at the time Inspector Barnhart took custody of Mr. Bevacqua that would give a reasonable officer any suspicion at all that Mr. Bevacqua was smuggling contraband, or items subject to duty, or was armed, or had violated the law in any manner. The court finds that Defendant's contention that the officers noticed bulges in

Bevacqua's pockets is not supported by the evidence, and is, in fact, merely an afterthought. There was nothing to create any suspicion at all. Despite Mr. Bevacqua's use of objectionable language and his argumentive nature about what was going on, he did finally comply with the order to furnish the requested driver's license.

Inspector Barnhart took Mr. Bevacqua by the arm immediately upon his statement that "I'm taking you to secondary," or words to that effect. Mr. Bevacqua physically resisted going with Inspector Barnhart. When they got outside, Mr. Bevacqua resisted even more. At this point, Inspector Barnhart took Mr. Bevacqua in a come-along-hold and again said he was "taking him to secondary". Once again, the inspector did not explain what he meant by "secondary" or just where he was taking Mr. Bevacqua. Inspector Barnhart forced Mr. Bevacqua to the Customs Port of Entry building. However, the court finds that Inspector Barnhart did not use excessive force in taking Mr. Bevacqua in a come-along-hold to the Port of Entry building. Mr. Bevacqua resisted both physically and vocally. Customs Inspector, Don Solu, Immigration and Naturalization Inspector, Tim Rynes, and Customs Area Director, Art Hancock came out of the Port of Entry Building to assist Inspector Barnhart.

After Barnhart got Bevacqua into the Port of Entry Building, he maneuvered him up to a counter, told him to place

his hands on the counter, step back, and spread his legs. Mr. Bevacqua continued to resist, and refused to comply. Inspector Rynes pinned his hands to the counter, while Inspector Barnhart forced his left foot between Bevacqua's feet, and with a "slide kick" spread his legs. At this, Mr. Bevacqua cried out "Ow, my knee", and appeared to slump or begin to fall. Inspector Barnhart had hold of Bevacqua by the belt and managed to keep him upright. The resulting pat down search and/or frisk revealed no weapons or contraband of any kind. The court finds the evidence does not establish that Inspector Barnhart turned around and kicked Mr. Bevacqua in the medial portion of the knee; rather Barnhart forced Bevacqua's feet apart in accordance with standard customs procedure, and the court finds this action caused an injury to Mr. Bevacqua, i.e. tears in the meniscus of his knee. The entire crew, including Mr. Bevacqua was subsequently released to complete their run with the train into Spokane.

Shortly after the incident, Mr. Bevacqua's left knee began to swell, and shortly after his return to Spokane, Bevacqua saw a physician who diagnosed a left knee sprain. On June 12, 1990, Dr. Richard Treloar performed anthroscopic surgery on Plaintiff's knee and made the following findings:

1. Mr. Bevacqua had badly torn lateral and medial menisci, the cartilage providing the weight bearing and the support in the movement of the knee, with a recent extension to

a previous tear in the left lateral meniscus;

2. One of the flaps of tissue from the old torn lateral meniscus had slipped into the joint, or "notch" and had become lodged there. It is uncertain whether this flap had been displaced and lodged in the notch by the May 21, 1990 incident;

3. Mr. Bevacqua had no anterior cruciate ligament in his left knee.

Mr. Bevacqua undertook physical therapy following the anthroscopic surgery, and remained off work for the UP for over a year. In February 1991, Dr. Richard P. Treloar opened Plaintiff's left knee, and by the use of a graft and screws, reconstructed the missing anterior cruciate ligament. After further extensive rehabilitation and physical therapy, Mr. Bevacqua was released by Dr. Treloar to go back to work in January, 1992. The railroad doctor insisted upon a work hardening program before allowing Plaintiff to return to work as a brakeman. Upon completion of that program, Mr. Bevacqua returned to work as a brakeman in the spring of 1992, where he has been employed to date. Mr. Bevacqua contends that he is unable to continue in his employment, due to the condition of his knee, and will be forced to retire early from the railroad. The Plaintiff Eugene Bevacqua is currently 37 years of age.

Mr. Bevacqua had suffered tears in his left meniscus, and had lost his anterior cruciate ligament during at least one of

two previous accidents.[1] However, the May 21, 1990 incident resulted in a portion of Mr. Bevacqua's left meniscus being locked into a notch, representing an acute displacement of the previously torn cartilage, as well as a peripheral extension of the tear in his left medial meniscus. There is no dispute that Mr. Bevacqua, prior to the 1990 incident, had no anterior cruciate ligament, and had prior tears in the meniscus. However, Mr. Bevacqua, while periodically having the knee lock up, had been able to perform his functions on the railroad without any difficulty.

FEDERAL TORT CLAIMS ACT

"In a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity ..." United States v. Testan, 424 U.S. 392 (1976). Plaintiff brought this action pursuant to the Federal Tort Claims Act, 28 U S. C. § 2671, et seq. which provides a partial waiver of sovereign immunity. 28 U.S.C. § 2674 states that "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances..." The Federal Tort Claims Act does not make the United States liable for all torts committed by its agents. The FTCA "provides a waiver of sovereign immunity for

[1] In 1974, Mr. Bevacqua fell off a box car, injuring his left knee. In 1978, he tripped over a railroad tie in the dark,reinjuring the left knee.

tortious acts of an agency's employees only if such torts committed in the employ of a private person would have given rise to liability under state law. Pereira v. U. S. Postal Service, 964 F. 2d 873, 876 (9th Cir. 1992).

Intentional Torts

Plaintiff contends that the detention and search at the border constituted an unlawful arrest, and that Inspector Barnhart assaulted and battered the Plaintiff. However, the FTCA also specifies torts for which the Government can not be held liable. The FTCA expressly excludes "any claim arising out of assault, battery, false arrest... 28 U.S.C. 2680 (h). Therefore, for purposes of the FTCA, the court need not find whether Bevacqua's detention was, in reality, an unlawful arrest. The court finds that the FTCA does not provide subject matter jurisdiction over any claim arising out of assault, battery, or false arrest. The question is not whether Barnhart's taking of Mr. Bevacqua to secondary inspection constituted an "arrest", but rather, whether the events that took place at the border on May 21, 1990 constitute a basis for liability of the Government. Clearly Plaintiff's claims of assault, battery, and false arrest are not cognizable under the FTCA.

Negligence

Plaintiff contends he is not claiming that the customs officers were negligent. However, much of Plaintiff's argument

is that the customs officers had a duty to follow customs regulations and policies, which they breached. This is clearly a negligence argument. The violation of a statute or regulation having the force of law can constitute negligence **per se.** See Leliefeld v. Johnson, 104 Idaho 357, 370, 659 P. 2d 111.

Plaintiff cites Berkovitz v. United States, 486 U.S. 531 (1988) and Arizona Maintenance v. United States, 864 F. 2d 1497 (9th Cir. 1989). In both of those cases, the plaintiffs alleged negligence. The courts stated that when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, the employee has no rightful option but to adhere to the directive. Therefore, the discretionary function exception to the FTCA can not apply.

Here, Defendant is not contending that the discretionary function applies. Both the Berkovitz and Arizona Maintenance courts analyzed the discretionary function exception and did not address the issue of negligence **per se.** However, in Jacobo v. United States, 853 F. 2d 640 (9th Cir. 1988) the court held that a navy manual is not a regulation, and does not have the force of law; therefore the failure to follow policies set forth in the manual does not constitute negligence **per se.** Nevertheless, the fact that Inspector Barnhart did not follow the procedures and policies set forth in the Customs Manual does not constitute negligence **per se,** does not end the

negligence inquiry.

The elements of a common law negligence action in Idaho are (1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) the defendant's conduct was a proximate cause of the resulting injury; and (4) actual loss or damage to the plaintiff. Black Canyon Racquetball v. Idaho First Nat'l Bank, 119 Idaho 171, 175-76, 804 P. 2d 900, 904-05 (1991).

The court finds that Agent Barnhart did have a duty to follow the law as set forth by the courts and as set forth in the customs manual to not conduct a personal pat-down search without minimal suspicion of wrongdoing as discussed **infra**; that Agent Barnhart breached that duty, which was a proximate cause of the injury to Mr. Bevacqua's knee; and which actually damaged Mr. Bevacqua.

However, there can be two or more proximate causes of an injury, which may originate from separate and distinct sources operating independently of each other. Pigg v. Brockman, 85 Idaho 492, 381 P. 2d 286 (1963). Idaho has a comparative negligence statute which applies to all negligence actions where there is negligence attributable to the person seeking to recover. See Harrison v. Taylor, 115 Idaho 588, 768 P. 2d 1321 (1989). Idaho Code § 6-801 (1987 Supp.) provides in pertinent part:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to

> recover damages for negligence or gross negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence or gross negligence of the person against whom recovery is sought...

Under the statute, a plaintiff found to be more than forty-nine percent negligent is barred from any recovery. Seppi v. Betty, 99 Idaho 186, 188, 579 P. 2d 683, 685 (1978). The court finds not only that Inspector Barnhart was negligent which was a proximate cause of plaintiff's injury, but that Mr. Bevacqua was also negligent in not complying with his duty not to resist an arrest, even though unlawful, discussed **infra,** and that his negligence was also a proximate cause of his injury. The court finds that the evidence established that Mr. Bevacqua's negligence was as great as that of Inspector Barnhart. Therefore, the court finds the Government can not be found liable for Plaintiff's damages under a negligence theory pursuant to the FTCA.

FOURTH AMENDMENT

Plaintiff argues that the detention and pat-down search of Bevacqua was a violation of the Fourth Amendment requirement of reasonableness. However, constitutional torts are not actionable under the FTCA. Pereira v. U. S. Postan Service, 964 F. 2d 873 (9th Cir. 1992). Neither can the United States be held liable for a constitutional tort under Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U. S. 388 (1971). Holloman v. Watt, 708 F. 2d 1399, 1401-02 (9th Cir.

1983), cert. denied, 466 U. S. 958, 1984). "Constitutional torts are, by definition founded on federal, not state law. Therefore, federal district courts have no jurisdiction over the United States where claims allege constitutional torts." Pereira, supra at 876. See also, Kreines v. United States, 959 F. 2d 834, 838 (9th Cir. 1992) ("In the context of the Fourth Amendment, the constitutional criteria for lawful conduct are distinct from those imposed by state tort law.")

Arnsberg v. United States, 757 F. 2d 971, (9th Cir. 1985), cert. denied, 474 U. S. 1101 (1986) was an action brought against the Government under the FTCA and the Fourth Amendment, seeking damages for execution by IRS agents of an invalid material witness arrest warrant, and against the agents, alleging liability under Bivens. The court stated:

> Arnsberg argues that we should imply a right of action against the United States directly under the fourth amendment. In essence, he asks us to extend the theory of Bivens v. Six Unknown Named Agents, 403 U. S. 388... (1971) to include a remedy against the United States...
>
> The doctrine of sovereign immunity, however, prevents us from extending Bivens in the manner which Arnsberg seeks. "In a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity..." United States v. Testan, 424 U. S. 392, 400... (1976). Arnsberg argues that because his Bivens right is a constitutional one, a non-constitutional doctrine of sovereign immunity ought not to take precedence over it. While this argument is not without logic, it is foreclosed by our recent ruling in Holloman v. Watt, 708 F. 2d 1399, 1401-02 (9th Cir. 1983), cert. denied, ___U. S.___, 104 S. Ct. 2168... (1984), that Bivens does not provide a means of cutting through the sovereign immunity of the United States itself.

See also Clemente v. United States, 766 F. 2d 1358, 1363 (9th Cir. 1985), cert. denied, 474 U.S. 1101 (1986) ("We cannot accept... that Bivens... logically compel(s) the United States to be held liable in damages for the constitutional torts of its officers.)

However, the Government has not alleged sovereign immunity as a defense to liability under the Fourth Amendment. Nevertheless, "although neither party raised the issue, a federal court must determine **sua sponte** its proper jurisdiction." Matter of Pizza of Hawaii, Inc., 761 F. 2d 1374, 1377 (9th Cir. 1985). The court finds that Plaintiff has not established a jurisdictional basis for his Fourth Amendment claims against the United States. Therefore, the court need not address the qualified immunity argument raised for the first time in Defendant's Response to Plaintiff's Post-Trial Brief. However, because the entire trial, as well as the post-trial briefs focused primarily on the reasonableness of the border search and seizure, the court is satisfied some observations about the reasonableness of the seizure and search in question would be appropriate.

THE BORDER SEARCH

As noted above, constitutional torts are founded on federal, not state law, and are therefore not cognizable under the FTCA. The parties have not cited, nor has the court found, any reported Idaho cases dealing with personal searches and

seizures at the border. Neither has the court seen any cases holding the Government liable for money damages due to an unreasonable border search and/or seizure, under any theory. However, there are a great many Supreme Court and Ninth Circuit cases dealing with the reasonableness of border searches. All of them deal with whether or not evidence seized during an alleged unreasonable search at the border should be suppressed in the context of a criminal charge.

19 U. S. C. § 482 provides:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine... any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law... and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law.

The Supreme Court explicitly stated that border searches constitute a special category under the Fourth Amendment in United States v. Ramsey, 431 U. S. 606 (1977). The Court reviewed the history of judicial treatment of border searches stating: "searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border..." Id. at 616. In United States v. Montoya de Hernandez, 473 U. S. 531 (1985), which involved the extended detention and non-routine search of a balloon swallower the

Court held that "detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal." Customs agents may "stop, search, and examine" any "vehicle, beast or person" upon which an officer suspects there is contraband or "merchandise subject to duty." Id. at 537-39 (emphasis added).

"The border search occupies a unique spot in fourth amendment jurisprudence." United States v. Des Jardins, 747 F. 2d 499, 502 (9th Cir. 1984), vacated on other grounds, 772 F. 2d 578 (9th Cir. 1985). Unlike almost all other searches, a routine border search may be initiated without a warrant, probable cause, or even articuable suspicion. United States v. Ramsey, supra "Travelers may be so stopped in crossing an international boundary because of a national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." Carroll v. United States, 267 U. S. 132, 154 (1925). Every person crossing our border may be required to disclose the contents of his baggage, and of his vehicle, if he has one. The mere crossing of the border is sufficient cause for such a search. Even "mere suspicion" is not required. "We assume that the same rule would apply to the

contents of his or her purse, wallet, or pockets. United States v. Wilmot, 563 F. 2d 1298, 1300 (9th Cir. 1977).

Such searches are routine. To determine whether a border search was routine turns on the degree of intrusion into a border entrant's legitimate expectations of privacy. United States v. Quintero-Castro, 705 F. 2d 1099, 1100 (9th Cir. 1983). More concretely, routine searches are defined as those which do not pose a "serious invasion of privacy" and which do not embarrass or offend the average person. United States v. Chase, 503 F. 2d 571, 573-74 (9th Cir. 1974), cert. denied, 420 U. S. 948 (1975).

While a border search may be initiated in the absence of both a warrant and probable cause, the officer conducting the search must nonetheless proceed in a reasonable manner. United States v. Des-Jardins, supra, 747 F. 2d 499. "Thus, while every person crossing the border may be required to disclose the contents of his or her baggage based on nothing more than the fact that he has crossed the border, more intrusive searches must be supported by some level of suspicion" and must be reasonable. Id. at 504. In each case the need for the particular search is balanced against the invasion that the search entails. United States v. Guadalupe-Garza, 421 F. 2d 876 (9th Cir. 1970). A simple pat-down search is "permissible with only a minimal showing of suspicion," United States v. Couch, 688 F. 2d 599, 604 (9th Cir. 1982), cert. denied, 459 U. S. 857

(citations omitted), whereas a strip search must be based on "real suspicion". Guadalupe-Garza, supra at 876, and a body cavity search requires a "clear indication" that the suspect is carrying contraband in a body cavity. United States v. Aman, 624 F. 2d 911, 912-13 (9th Cir. 1980). The "minimal suspicion" standard for a pat-down search is the same whether the officer is looking for a weapon or illegal contraband. Des Jardins, supra 747 F. 2d at 504.

> Moreover, we have never indicated that a higher standard applies when the officer conducting the search seeks something other than a weapon. Thus, the initial pat-down search was permissible so long as only minimal suspicion was present.
>
> This standard was clearly met. The fact that appellant's suitcase contained a number of objects frequently used in narcotics smuggling alone is sufficient to supply the minimal suspicion necessary to justify the initial pat-down search.

Id. at 505 (emphasis added).

Defendant cites numerous cases for the proposition that forcing Mr. Bevacqua to secondary and conducting a pat-down search was just a routine border search, requiring no suspicion other than the subjective knowledge that he crossed the border. However, these cases do not support the contention. In all of them there was clearly some suspicion of wrongdoing. For example, in United States v. Sanchez-Robles, 927 F. 2d 1070 (9th Cir. 1991), the customs inspector at primary inspection noticed a strong odor of marijuana inside the van, causing him to send the van to secondary for further inspection. A pat-down search of Sanchez-Robles was also conducted. The court did not

address the question of whether "minimal suspicion" was present. However, clearly, under the facts of that case, the customs officers had at least minimal suspicion that Sanchez-Robles was breaking the law. See also Des Jardins, supra.

That some suspicion is required in order to conduct a personal search at the border is clearly recognized by the Customs Service. The U. S. Customs Service Inspector's Handbook (1978 edition) § 9.12.1 states in pertinent part:

> The search authority of Customs officials is broader than that vested in other Federal officers. This is because of the recognition that such search authority is essential to the proper enforcement of the laws governing the entrance of persons and things into the U. S. This essential authority must be zealously guarded against any abuse. Customs search authority is based on real suspicion and articuable facts that merchandise or contraband is being introduced into the U. S. contrary to law...
>
> a. A personal search is not routine search, and the decision to perform such a search is not to be taken lightly. A personal search cannot be initiated as a retaliatory or punitive measure...
>
> b. There are three types of personal searches. Each of these searches require a different degree of suspicion that contraband or merchandise is concealed on the person.
>
> (1) Pat down. A pat down of a person's clothing will not be made as a matter of routine but only when it is deemed necessary as a result of some suspicion on the part of the Customs officer that there is merchandise or contraband which is being introduced into the U. S. contrary to law. A pat down is always the first step in a personal search.

The Customs Law Course § 3.600 entitled **Border Search and Seizure of Persons** provides in pertinent part:

> People may be seized and subjected to a pat-down search. **By policy, some or mere suspicion is needed to pat-down.** Some or mere suspicion can be as little as a hunch.

> For policy reasons, Customs distinguishes between a pat-down and a frisk. A pat-down is for merchandise. A frisk is for weapons. A quick "yes" to the mental question, "Are there facts which cause me to suspect that my safety or the safety of those around me may be in danger? shall **always** result in a frisk of the person for weapons...

A Customs Directive provides in pertinent part:

> The Constitution guarantees the protection of an individual's rights against unreasonable search and seizure. Officers of the U. S. Customs Service must be diligent in their efforts to protect those rights while still accomplishing their enforcement mission. The courts recognize that Customs authority for border search is of the broadest possible character. The right to inspect travelers and goods entering the United States without a warrant or probable cause places an important responsibility upon the Customs officer. The officer must not violate any clearly established statutory or constitutional rights which a reasonable officer would have known and must conduct the search in a reasonable and professional manner.

The type and level of suspicion demanded by the reasonableness requirement is "incapable of comprehensive definition... [I]n each case the need for the particular search is balanced against the invasion that the search entails." Guadalupe-Garza, supra, 421 F. 2d at 878. The Ninth Circuit has provided some general guidelines. In United States v. Palmer, 575-F. 2d 721 (1978), cert. denied, 439 U. S. 875 the court stated:

> [f]or examination of vehicle(s), luggage, contents of pockets or purse, no suspicion at all is required; for a strip search, "real suspicion directed specifically to that person" is required... But between a search of pockets and a strip search there can be a wide variety of types of intrusion, with varying degrees of intrusiveness... It is hardly feasible to enunciate a clear, and simple standard

for each.

Id. at 723.

Nevertheless, the Ninth Circuit, in analyzing pat-down searches at the border, has required a certain level of suspicion described as "mere suspicion." United States v. Grayson, 597 F. 2d 1225, 1228 (9th Cir. 1979), cert. denied, 444 U. S. 875 (citations omitted); United States v. Carter, 563 F. 2d 1360, 1361 (9th Cir. 1977). In Carter the defendant arrived at customs and passed through the initial customs check. Thereafter, he was taken to a secondary search room where the customs inspector asked the defendant to empty his pockets, which he did. The customs inspector then asked the defendant to remove his overcoat and suit coat. The defendant complied and the inspector found a package of heroin in the suit coat. The court stated:

> Those entering the country may be examined as to their "belongings and effects" without violating the Fourth Amendment. Belongings and effects have been held to include the contents of a person's purse, wallet or pockets.

Id. at 404-05 (citations omitted).

Also, the Ninth Circuit has continued to recognize that some minimal suspicion is required to perform a personal pat-down search at the border. A simple pat-down search is "permissible with only a minimal showing of suspicion." United States v. Couch, 688 F. 2d 599, 604 (9th Cir. 1982), cert. denied, 459 U. S. 857 (citations omitted); United States v.

Carter, supra ("[m]ere suspicion is enough to justify a non-intrusive border search such as the "pat down" that occurred here). The same standard applies whether the officer conducting the search is looking for a weapon (frisk) or contraband. In the case of a frisk, there must be minimal suspicion that the safety of an officer or those around him is in danger. A pat-down for merchandise requires minimal suspicion that the person has merchandise which is subject to duty. Most recently, the Ninth Circuit has said "[t]he detention of a traveler who enters the United States must be based on a reasonable suspicion (rather than minimal suspicion) that he or she is engaged in smuggling." United States v. Oba, ___F. 2d___, Slip. Op. No. 91-10137 (9th Cir., filed November 2, 1992) citing United States v. Montoya de Hernandez, 473 U. S. 531, 541 (1985).

Here, there was absolutely no reason to suspect that Mr. Bevacqua was carrying contraband or merchandise subject to duty. He provided the requested drivers license, albeit very reluctantly, by throwing it onto the table. Furthermore, there was absolutely no reason to suspect that Mr. Bevacqua was armed or that he had done anything illegal. Once Bevacqua threw his license onto the table, Agent Barnhart took hold of Bevacqua and said "you're going with me".

It is not clear whether Defendants are contending the search of Mr. Bevacqua was a pat-down for merchandise or a

frisk for weapons. None of the customs officials involved were able to articulate any suspicion, whatsoever, not even a hunch, that Mr. Bevacqua was carrying a weapon, or illegal merchandise, or anything subject to duty.

Secondary Inspection

The next question is whether Agent Barnhart had the authority to insist that Mr. Bevacqua proceed to secondary inspection and force him there for a pat-down search. It is undisputed that Inspector Barnhart physically forced Bevacqua to a secondary inspection area where the pat-down search was conducted.

A vehicle can be stopped at "reasonably located checkpoints" for brief initial questioning and can be referred to a secondary inspection area for further brief questioning "in the absence of any individualized suspicion..." United States v. Martinez-Fuerte, 428 U. S. 543, 562 (1975). There, the Supreme Court held that there was no constitutional violation where motorists were referred selectively to the secondary inspection area at the San Clemente checkpoint largely on the basis of apparent Mexican ancestry, and that border patrol agents are entitled to refer people to the secondary checkpoint even without any individualized suspicion. See also, United States v. Morales, Slip Op. No. 91-50513, (9th Cir., amended November 25, 1992); United States v. Barnett, 935 F. 2d 178, 181-82 (9th Cir. 1991).

> It is asserted the testimony indicates the officer had no knowledge or suspicion that the vehicle contained any contraband or that the defendant was involved in any illegal act. Appellant apparently contends there were two searches, one at the border and a second in the secondary area, and there must be suspicion aroused by the border interview in order to justify the second search.
>
> The border search conducted at the primary area and the secondary area was one event, not two separate and distinct searches.

Klein v. United States, 472 F. 2d 847, 848 (9th Cir. 1973).

However, the Klein court also stated "A border search is not one where probable cause is required. Search and seizure at borders are also subject to a general test of "reasonableness," but probable cause is not required. (emphasis added). The court did not say that no suspicion at all was required to perform the search. Additionally, Klein involved the search of an automobile, not a personal pat-down search.

Likewise, in United States v. Troise, 796 F. 2d 310 (9th Cir. 1986), the court found the stop and inspection of a vessel on the high seas reasonable where it was unclear what level of suspicion customs officials had, indicating that they did have some suspicion. In none of the cases dealing with secondary inspection, was a person forced to secondary inspection for the sole purpose of conducting a personal pat-down search without any suspicion of an immigration offense.

Defendant relies on United States v. Sandoval-Vargas, 845 F. 2d 1526 (9th Cir. 1988). (Sandoval-Vargas I) where the court

stated that mere entry into the United States is sufficient to form the subjective suspicion required to search a "person" or vehicle" at the border. In that case, defendant Sondoval drove a volkswagon from Mexico into the United States. At primary inspection, a customs inspector randomly referred eight vehicles, including Sandoval's to secondary inspection to be searched. Marijuana was found hidden in Sandoval's vehicle. The sole question before the court was "whether individualized or reasonable suspicion is required — by Constitution, statute or both — before a vehicle may be searched at the border." Id. at 1527. (emphasis added).

The court held that neither the Constitution or statute required reasonable suspicion for a vehicle search at the border. The court held that (1) the search of Sandoval-Vegas' vehicle at the border by customs agents did not violate the Fourth Amendment; (2) that 19 U. S. C. § 482 governing routine border searches of vehicles does not impose any additional limitations beyond those prescribed by the Constitution; and (3) that on its face § 482 requires "mere suspicion" for a search of a "vehicle, beast, or person" and "reasonable cause to suspect" for a search of a trunk or envelope.

Clearly, Sandoval-Vargas involved a search of a vehicle, not a personal search. Throughout, the court talks about the search of a vehicle.

> We conclude, that section 482 governs searches at the land border. We read section 482 to require only

> subjective suspicion for a routine border search of a vehicle, and we hold that such suspicion is readily supplied by the fact that the vehicle has entered the country from the outside.

Id. at 1533. (emphasis added).

Thus, Sandoval-Vargas comports with other Ninth Circuit and Supreme Court decisions regarding routine border searches. However, Sandoval-Vargas did not involve a personal search of any kind, and there is no way to square the Defendant's suggestion that only subjective suspicion for a border search of a person is required and that requirement is satisfied whenever the person being searched has just entered the United States from the outside with the many Ninth Circuit decisions declaring that minimal or mere suspicion is required in order to conduct a personal pat-down search.

> So far as we know there is nothing about the search (of the automobile) that takes it out of the realm of routine border searches. Sandoval-Vargas was clearly at the port of entry from Mexico. ...The stipulation does not indicate any extended period of detention or any unusual, offensive, or intrusive search of the defendant's person. There was merely a vehicle search by customs inspectors, typical of those conducted at the border. The fact that the search occurred at a secondary inspection point is not sufficient, in itself, to render this a non-routine search. Nor is the fact that not all cars were searched but only a randomly selected number. The law is clear that a border search of a vehicle in those circumstances is per se reasonable within the meaning of the fourth amendment...

Id. at 1528. (emphasis added).

The Sandoval-Vargas opinion was amended and superseded by the opinion at 854 F. 2d 1132 (9th Cir. 1988). (Sandoval-

Vargas II). The words in the two opinions are nearly identical. However, importantly, both opinions state:

> ...Nevertheless, the language of the statute strongly supports the view that section 482 requires only subjective suspicion – not individualized reasonable suspicion – for a routine border search of a vehicle. See United States v. Sandler, 644 F.2d 1163, 1169 (5th Cir. 1981)) (en banc) ("We do not read 19 U.S.C. § 482 as requiring any suspicion other than the subjective response of a customs official who considers that the circumstances make such a search appropriate."

In Sandoval-Vargas I, the paragraph ends there. Id. at 1532. (emphasis added). However, in Sandoval -Vargas II, the court added another citation at the end of the paragraph, Maguire v. United States, 396 F.2d 327, 330 (9th Cir. 1968) ("mere suspicion" sufficient for search of a vehicle under section 482). Id. at 1138 (emphasis added). In neither opinion, did the court hold that a personal pat-down search can be conducted at the border without any suspicion whatsoever.

The Supreme Court has also recognized than the search of an automobile is "far less intrusive on the rights protected by the Fourth Amendment than the search of one's person..." Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

In United States v. Dorsey, 641 F. 2d 1213 (7th Cir. 1981), Dorsey arrived at O'Hare International Airport from Kingston, Jamaica. A customs agent examined Dorsey's passport and noted that it revealed the following travel schedule: entered Jamaica on July 21, 1979; entered Panama on July 22, 1979; entered Colombia on July 25, 1979; entered Panama on July 27,

1979, entered Jamaica on August 13, 1979.

Dorsey was then referred to a separate room for a secondary search of his luggage. This search revealed only clothing and receipts for $2,700 in traveler's checks. The agent asked Dorsey to empty his pockets. Dorsey emptied all his pockets except his left shirt pocket. The agent then conducted a pat-down search of Dorsey which revealed a cigarette package in his left shirt pocket. Further inspection of the cigarette package disclosed a plastic bag containing 58.5 grams of cocaine.

Dorsey sought to suppress the cocaine found in his shirt pocket, arguing that the pat-down search violated his rights under the Fourth Amendment. The government relied on United States v. Carter, Supra, while Dorsey argued that the "real suspicion" standard for a strip search should be applied. The court rejected both arguments.

> Our conclusion that strip search principles are inapplicable does not lead us to conclude that the instant type of intrusion may be performed without any degree of suspicion. The Carter case relied upon by the Government, as well as similar decisions, did not involve pat-down searches. Instead, they involved a request to remove an outer garment and subsequent searches of pockets and thus were performed absent even minimal suspicion. Likewise, we do not think that those cases which allow the search of personal effects and belongings, contents of pockets, wallets, etc. govern a pat-down search. We believe that the intrusions on privacy and indignities involved in a pat-down search exceed those of a search of the contents of a purse or wallet or of a request to empty pockets.

Id. at 1217. (citations omitted). In support of this finding,

the court stated:

> The Ninth Circuit, in analyzing pat-down searches, has required a certain level of suspicion described as "mere suspicion." (citation omitted). This is in recognition of the fact that the intrusiveness of a pat-down search exceeds that of a routine border search. In Grayson, the Ninth Circuit stated: Although...we said that no suspicion was required to examine the contents of pockets we stated that "mere suspicion" was necessary for a pat-down at a border.

Id. at 1218 and n. 10.

Likewise, this court does not find that the pat-down search of Mr. Bevacqua was a "routine" border search of luggage, vehicle, pockets, or wallet.

The court finds that Agent Barnhart was taking Mr. Bevacqua to secondary for only one purpose, to conduct a personal pat-down search. Although Martinez-Fuerte, is limited to stops for immigration-related searches, that limitation "does not mandate an inquiry into the subjective purpose of the agent making referrals to secondary inspection unless there is some objective evidence supporting the charge of pretext. United States v. Koshnevis, ____F. 2d____, Slip Op. No. 91-50050 (9th Cir. Amended November 23, 1992). (In the absence of affirmative evidence that referral to secondary inspection was for drug-related offenses, agent need not demonstrate articuable suspicion for an otherwise lawful immigration stop); United States v. Barnett, 935 F. 2d 178 (9th Cir. 1991). Had defendants shown that the agents were looking only for drug violations, not immigration violations, the result might be

different. But without some evidence the court refused to infer the agents had an improper motivation. Id. at 181.

Here the evidence clearly established affirmatively that Inspector Barnhart's sole purpose in forcing Mr. Bevacqua to secondary was to conduct a personal pat-down search. There was not even a pretense that the purpose of forcing Bevacqua to secondary was to question him, search his luggage, vehicle, or only to empty his pockets. Under the law of the Ninth Circuit, and as set forth in the Customs regulations, minimal or mere suspicion is required for such a personal pat-down search. The court finds that the customs officers had absolutely no suspicion, not even a hunch, that Mr. Bevacqua was smuggling illegal goods into the country, or that he was armed with a dangerous weapon. The court is satisfied that Inspector Barnhart did not have the authority to insist that Bevacqua proceed to secondary inspection and force him there for the purpose of conducting a pat-down search and/or frisk, both under Customs Directives, and the law of the Supreme Court and Ninth Circuit.

Agent Barnhart would have had the authority to refer Bevacqua's vehicle to secondary for inspection, and Bevacqua himself for limited questioning, as well as a search of his pockets without any articuable suspicion of wrongdoing, but not the authority to force him there for the purpose of a personal pat-down search. Agent Barnhart had no intention of taking

Bevacqua to secondary for questioning, and there was no vehicle or luggage at secondary to inspect. Barnhart's actions were improper. However, the inquiry does not end here. The next issue is whether Mr. Bevacqua had a duty to refrain from physically resisting going to secondary, even though there was no authority to take him there.

Duty Not to Resist Arrest

Assuming that Mr. Bevacqua was unlawfully arrested, under Idaho law, he still had a duty not to resist the arrest unless Inspector Barnhart initiated violence or used excessive force in making the arrest. At common law, a person unlawfully arrested could resist such an arrest by the use of reasonable force. John Bad Elk v. United States, 177 U.S. 529 (1900). However, most jurisdictions, including Idaho, have modified the common law in this respect. The Idaho Supreme Court held that if a person has reasonable ground to believe he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting the arrest, regardless of whether or not there is a legal basis for the arrest. State v. Richardson, 95 Idaho 446, 511 P.2d 263 (1973).

> To us the question is whether any amount of force should be permitted to be used by one unlawfully but peaceably arrested. We feel that the legality of a peaceful arrest should be determined by courts of law and not through a trial by battle in the streets. It is not too much to ask that one believing himself unlawfully arrested should submit to the officer and thereafter seek his legal remedies in court...
>
> We hold that an individual may not use force to

> resist an arrest by one he knows or has good reason to believe is an authorized peace officer in the performance of his duties. In the event that the arrest in unlawful, the arrested individual may seek relief under I.C. § 18-703 which provides that any public officer who arrests any person or detains one against his will without a regular process or lawful authority is guilty of a misdemeanor, or he may proceed with a civil action for false arrest under I.C. § 18-2901.

Id. at 267-68.

However, Idaho courts have also recognized that a person is entitled to protect himself, if the officers initiate violence or use excessive force while making an arrest. State v. Wren, 115 Idaho 618, 768 P.2d 1351 (Ct. App. 1989); State v. Hartwig, 112 Idaho 370, 732 P.2d 339 (Ct. App. 1987).

Plaintiff argues that he had a right to "passively resist" the unlawful arrest citing State v. Wilkerson, 755 P.2d 471 (Idaho Ct. App. 1988) where the court stated:

> We are not prepared to accept the proposition that our legislature intended to criminalize passive disobedience to any act of a police officer. Many of the reasons to broadly construe the term 'duty' that were present in Richardson are not presented here. Passive resistance does not present the same immediate risk of violence and physical harm as does forcible resistance."

Id. at 180.

The court does not find that Mr. Bevacqua's resistance was merely passive. Rather, he physically and forcibly resisted being taken to secondary inspection. The court finds that while Agent Barnhart did not have any basis, in fact, to require Bevacqua to go to "secondary", he did not use excessive

force in taking Bevacqua to secondary. A customs officer may use all necessary force to compel compliance when inspecting persons at the border. 19 U.S.C. § 1581 (a) & (f). Therefore, Bevacqua had no right to resist the arrest, even though it was unlawful.

The court is concerned that Inspector Barnhart, because he had authority as a customs agent, utilized it in an authoritarian manner without proper courtesy and civility. His attitude was "I have this authority and you will comply with every single directive and word that I utter." Mr. Bevacqua may have had a viable action against Inspector Barnhart pursuant to a civil action for false arrest under I.C. § 18-2901, as stated by the court in Richardson, supra or an action against Barnhart for claims of assault, battery or false imprisonment under state law. However, under the Idaho Tort Claims Act, I.C. § 6-904, a governmental entity can not be held liable for damages due to assault, battery or false arrest without a finding of malice or criminal intent. Malice within the definition of the ITCA means "actual malice" which requires a wrongful act without justification combined with ill will. Evans v. Twin Falls County, 118 Idaho 210, 796 P.2d 87 (1990). The court finds that the evidence did not establish that Agent Barnhart acted with malice or criminal intent.

Additionally, in Lively v. City of Blackfoot, 91 Idaho 80, 416 P.2d 27 (1966), Lively contended inter alia that her arrest

was wrongful, without warrant, or judicial order, or other authority of law; and that the arresting officers beat and assaulted her, though no attempt was made to resist the arrest; and was otherwise deprived of her civil liberites. The Court stated:

> The cases and authorities make plain however that a municipality, unless expressly so provided by statute, is not liable for those wrongs as alleged by appellant in her complaint...
>
> The Idaho case of Klam v. Boehm, [72 Idaho 259, 240 P.2d 484], is additional authority in support of the conclusion that all counts listed in appellant's complaint fall within a governmental function...The plaintiff in the Klam case brought his action for damages against the police chief of Boise seeking to hold him responsible together with the police officers under his supervision for the alleged misconduct of the officers which consisted of false arrest, false imprisonment, and assault and battery said to have been committed while plaintiff was wrongfully detained in the city jail. This court sustained the judgement of dismissal as to the police chief for failure to state a cause of action and specifically held that a policeman is a public officer whose duties relate to governmental functions of a municipality and that the maintenance of a jail additionally is a governmental function. See also the case of City of Nampa v. Kibler, [62 Idaho 511, 113 P.2d 411], wherein this court held that a municipality is not liable for the assault and battery committed by its police officers in the discharge of their duties as officers.

Therefore, this court finds that even if Mr. Bevacqua's claim of assault, battery, and false arrest against the United States were not specifically precluded under the Federal Tort Claims Act, as they are, Mr. Bevacqua would not be able to hold a governmental entity such as a municipality liable under Idaho law for claims of assault, battery, false arrest, or false

imprisonment. The Idaho cases relied upon by Plaintiff, Antelope v. George, 211 F. Supp. 657 (N. D. Id. 1962) and Anderson v. Foster, 73 Idaho 340, 252 P. 2d 199 (1953) were actions brought against police officers for their alleged conduct, not against a governmental entity, such as a municipality for which they worked.

The Actual Pat-Down Search

Although Agent Barnhart had no reason to suspect that Mr. Bevacqua was carrying contraband or that he was armed, and therefore, had no actual authority to insist that Bevacqua accompany him to "secondary" for a personal pat-down search, the court finds that the actual pat-down search that occurred was reasonable due to Mr. Bevacqua's resistance and failure to comply with the agent's directives to go with him to "secondary." Bevacqua's active and forceful resistance to being taken to secondary gave Inspector Barnhart the minimal or mere suspicion necessary to justify a pat-down search.

In United States v. Wilmot, 563 F. 2d 1298 (9th Cir. 1977), during the course of a secondary inspection, a customs inspector attempted to give Wilmot a pat-down search to determine if he had a weapon. Wilmot declined to spread his legs, and when the inspector attempted to spread them, Wilmot closed them. "This appears to be nothing more than a typical pat-down. If more were necessary to justify this activity, Wilmot's suspicious conduct in resisting the mere spreading of

his legs clearly constitutes a reasonable basis for any "extensive" pat-down search." Id. at 1300 (9th Cir. 1977).

The court finds that, by reason of the prior resistance of Mr. Bevacqua, Agent Barnhart had a valid basis to perform a pat-down or frisk search of Mr. Bevacqua, and that Barnhart did not use excessive force in conducting that search. The court also finds that the negligence of Mr. Bevacqua in physically resisting Agent Barnhart's directives was equal to or exceeded the negligence of Agent Barnhart.

CONCLUSIONS OF LAW

1. The United States has not waived its sovereign immunity for claims arising out of alleged assault, battery, or false arrest. Therefore, this court has no jurisdiction under the Federal Tort Claims Act for those claims.

2. Plaintiff has alleged no jurisdictional basis to hold the United States liable for a constitutional tort under the Fourth Amendment.

3. Agent Barnhart had no authority to force the Plaintiff to secondary inspection for the purpose of conducting a personal pat-down search without even mere suspicion of wrongdoing.

4. Plaintiff breached his duty not to resist a peaceful unlawful arrest.

5. Plaintiff has not shown Defendant's negligence to be greater than his own.

6. The resulting pat-down search was reasonable in view of the Plaintiff's physical resistance.

Based on the foregoing, **IT IS HEREBY ORDERED** that the Defendant United States of America is entitled to a Judgment in its favor.

The Clerk of this court shall enter Judgment in favor of the United States of America dismissing the Complaint and the claims therein with prejudice, and forward copies thereof to counsel for the parties.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Opinion and furnish copies to counsel.

DATED this 2nd day of February 1993.

JUSTIN L. QUACKENBUSH

United States District Judge

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF IDAHO

EUGENE F. BEVACQUA, Plaintiff, vs. UNITED STATES OF AMERICA Defendant.	Civil No. 91-0178-N-HLR JUDGMENT

The Court has examined the entire record in this matter, including the evidence and testimony taken at the trial held on September 21, 1992. In accordance with the views expressed in the Memorandum Opionion, Findings of Fact and Conclusions of Law,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of the Defendant, United States of America, dismissing the Complaint and the claims therein with prejudice.

Dated this 23rd day of February, 1993.

RON HABERMAN
Deputy Clerk

Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EUGENE F. BEVACQUA, Plaintiff-Appellant, v. UNITED STATES OF AMERICA Defendant-Appellee.	No. 93-35236 D. C. No. CR-91-00178-HLR **MEMORANDUM***

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued and Submitted August 2, 1994
Seattle, Washington

Before: **WRIGHT, KOZINSKI** and **FERNANDEZ**, Circuit Judges.

Because it is not as intrusive as a strip search or body cavity search, a pat-down search is considered a routine border search requiring no justification. See United States v. Ramos-Saenz, No. 93-50759, slip op. 12629, 12633-34 (9th Cir. Oct. 14, 1994). The pat-down search here was therefore not a "negligent or wrongful act" in itself, nor did Barnhart use excessive force or deviate from standard customs procedure in performing it. Mem. op. 7-8. If a government employee has not committed a "negligent

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R 36-3.

or wrongful act," there is no liability under the Federal Tort Claims Act. 28 U. S. C. § 1346 (b); Laird v. Nelms, 406 U.S. 797, 799 (1972). That being said, we note that the conduct alleged here — customs agents making life unpleasant for railroad personnel in retaliation for failing to repair a noisy train valve — is abusive. Our ruling that it is not tortious should not be read as condoning in any way such conduct on the part of government employees.

AFFIRMED.